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Nos. 71-1355 and 71-1356

In the Supreme Court of the United States

OCTOBER TERM, 1971

MAX W. HESSMAN AND WILLIAM A. CROCKET, A PARTNERSHIP d/b/a SANDY CROCKET DODGE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

VALLEY FORD SALES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM OF THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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MAX W. HESSMAN AND WILLIAM A. CROCKET, A PARTNERSHIP d/b/a SANDY CROCKET DODGE, PETITIONER

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1. These two cases, which were consolidated for purposes of argument in the court of appeals, involve a challenge by two automobile dealers in Fresno, California, to orders of the National Labor Relations Board requiring them to bargain with the International Association of Machinists, District Lodge No.

465-526—72——1

87 (the Union), as the representative of their salesmen. The basic question presented is whether the Board properly established separate bargaining units for the salesmen of each dealer, instead of one unit consisting of all the members of the association to which the two dealers belong. The facts relevant to this issue are as follows:

In the fall of 1968, the Union filed petitions with the Board's Regional Director seeking to represent, in separate units, the salesmen of the two companies petitioning here. The companies are two of the 11 members of the Fresno Motor Car Dealers Association, an organization which acts for its members in labor negotiations (R. 15, n. 2; Tr. 86).[1] Since 1937, the Association has had contracts with the Union covering the mechanics and parts men employed by the various member-employers (R. 15, n. 2; Tr. 44–45). In 1953, 1955 and 1958, the Board, pursuant to consent election agreements between the Association and certain labor organizations other than the Union, conducted representation elections among the salesmen of the Association's members. A union was certified as the representative of those employees based on the results of the 1958 election, but, after about 15 months of bargaining, the parties were unable to reach agreement and negotiations were discontinued. Thus, the salesmen have never been covered by a multi-employer

[1] "R." refers to the formal documents contained in "Volume I, Pleadings" of the record in the court below in the *Valley Ford* case, No. 26,785. "Tr." refers to the transcript of the proceedings before the Board.

contract between the Association and any labor organization (R. 15, n. 2; Tr. 59–61).

The employer-members of the Association employ about 163 salesmen, of whom 36 are employed by the two companies here. Although there is a high turnover among salesmen so that a salesman may work successively for one or more employer-member of the Association, each employer-member operates independently and there is no uniform policy regarding wages, hours or other conditions of employment (R. 15, n. 2; Tr. 93).

Based on the foregoing facts, the Board's Regional Director concluded in each case that "the salesmen" employed by the [company] comprise a separate group which has internal homogeneity and cohesiveness and can stand alone as an appropriate unit." The Director relied on *E–Z Davies Chevrolet,* 161 NLRB 1380, enforced, 395 F. 2d 191 (C.A. 9), where the Board had found a similar group of employees to constitute an appropriate unit (R. 15, n. 2).[2] The Union won the ensuing elections, and was certified by the Director as bargaining representative for each company's salesmen (Pet. No. 71–1355, App. iii; Pet. No. 71–1356, App. iv).

[2] With regard to the companies' contention that the election petitions were defective because signed by an unauthorized person—Grand Lodge Representative Byrnes of the International Union—the Director noted that the local Union's business representative testified at the hearing and "neither challenged nor objected to the action of the Grand Lodge Representative in either signing the petition or entering an appearance and further representing [the Union] at the hearing" (R. 14, n. 1).

The companies refused to bargain with the Union, unfair labor practice complaints were issued, and the Board found that the companies had violated Section 8(a)(5) and (1) of the Act. The Board ordered the companies to bargain with the Union on request (Pet. No. 71–1355, App. iii, ix–xi). The court of appeals[3] enforced the Board's orders, relying on its earlier decision in *National Labor Relations Board* v. *E-Z Davies Chevrolet*, 395 F. 2d 191 (C.A. 9).

2. Petitioners' contention that the Board erred in failing to establish a multi-employer unit of salesmen is without merit; accordingly, further review of the Board's order is not warranted. It is well settled that the Board is vested with broad discretion to determine appropriate units for collective bargaining, and its determination is not to be disturbed unless it is unreasonable: *Packard Motor Co.* v. *National Labor Relations Board*, 330 U.S. 485, 491. No such showing can be made here.

A unit comprising the salesmen of a particular company is, as the Board found, a homogeneous grouping of employees. Moreover, "[t]he fact that there had been a history of successful multiemployer bargaining with representatives of groups of different classes of employees should not, of itself, divest the salesmen of their right to choose a representaive." *National Labor Relations Board* v. *E–Z Davies Chevrolet supra*, 395 F. 2d at 193. Accord: *Joseph Seagram & Sons*, 101 NLRB 101. Similarly, the fact that the

[3] The court's orders, which are omitted from the appendices to the petitions, are set forth, *infra*, pp. 7–8.

Board previously found a broader unit to be appropriate does not preclude it from subsequently designating a smaller unit. See *State Farm Mutual Insurance Co.* v. *National Labor Relations Board*, 411 F. 2d 356 (C.A. 7), certiorari denied, 396 U.S. 832.[4]

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.[5]

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
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National Labor Relations Board.
MAY 1972.

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[4] The cases cited by petitioners (Pet. No. 1356, 15–16) are inapposite. In *Peninsula Automobile Dealers Assoc.*, 107 NLRB 56, 58, the union requested a multi-employer unit; and, in *Los Angeles Statler Hilton*, 129 NLRB 1349, the employees sought to be represented were not a homogeneous group. *Dancker & Sellew*, 140 NLRB 824, holds that a separate class of employees may not be included in a multi-employer unit against its will, whereas *Steamship Trade Assoc.*, 155 NLRB 232, 235, holds that, once a multi-employer unit has been properly established, classes of employees desiring inclusion therein cannot be excluded. Finally, in *Morgan Linen Service, Inc.*, 131 NLRB 420, the Board found that single-employer units of drivers were inappropriate since the drivers had been continuously represented in a multi-employer unit; here, there had never been successful multi-employer bargaining for the salesmen.

[5] The remaining contentions are insubstantial. With regard to the signing of the election petition (Pet. No. 1356, 17–18), the Board's rule states that a petition "may be filed by an employee or group of employees or any individual or labor organization acting in their behalf." 29 CFR 102.60. The Board has long held that this rule is "solely for the convenience and protection of the Board" and does not "empower an employer to question the authority of * * * a particular individual to act on behalf of a labor organization." *Sorg Paper Co.*, 8 NLRB 657, 658, n. 1. See *National Labor Relations Board* v. *Guisti-*

na Bros. Lumber Co., 253 F. 2d 371, 374 (C.A. 9). Moreover, contrary to petitioners' contention (Pet. No. 1356, 18), Byrnes did profess authority to act on behalf of the local Union by virtue of his position with the International (Tr. 17–20).

With regard to the contention that the hearing officer erred in permitting testimony, rather than requiring documentary evidence, as to the Union's practice in filing representation petitions, the Board is not required to follow the "best evidence" rule. See Section 10(b) of the Act, 29 U.S.C. 160(b). *National Labor Relations Board* v. *Jones Lumber Co.*, 245 F. 2d 388, 392 (C.A. 9); *Pacific Tent & Awning Co.*, 97 NLRB 640. Moreover, petitioners have failed to show that they were prejudiced by the hearing officer's action. See *National Labor Relations Board* v. *Biazevich*, 374 F. 2d 974, 981 (C.A. 9).

APPENDIX

United States Court of Appeals for the Ninth Circuit

Nos. 26785 and 26839

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

VALLEY FORD SALES, INC., d/b/a FRIENDLY FORD (formerly d/b/a PAUL JOHNSON FORD), RESPONDENT

ORDER

Filed December 23, 1971—Wm. B. Luck, Clerk

Before: DUNIWAY, CARTER, and HUFSTEDLER, Circuit Judges.

Because the court has concluded that the case does not materially differ from *NLRB* v. *E-Z Davies Chevrolet* (9th Cir. 1968) 395 F. 2d 191, the court orders enforcement of the Board's order of May 22, 1970. For the same reason, the court rejects the Company's Petition for Review. We think the record amply supported the Board's determination that the representation petition was appropriately before the Board.

The Order of the Board shall be enforced. The Petition for Review is dismissed.

United States Court of Appeals for the Ninth Circuit

No. 25895

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MAX W. HESSMAN AND WILLIAM A. CROCKET, A PARTNERSHIP, d/b/a SANDY CROCKET DODGE, RESPONDENTS.

Filed December 23, 1971—Wm. B. Luck, Clerk

ORDER

Before: DUNIWAY, CARTER, and HUFSTEDLER, Circuit Judges.

The court has concluded that *NLRB* v. *E–Z Davies Chevrolet* (9th Cir. 1968) 395 F. 2d 191 is dispositive of this case and its companion case *NLRB* v. *Valley Ford Sales, Inc.*, No. 26785. It is unnecessary to reach the remaining issues in the Board's Petition or in the Company's Petition for Review.

The ORDER of the Board shall be enforced. The Petition for Review is dismissed.

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